In the Supreme Court of the United States

OCTOBER TERM, 1951

MONTGOMERY BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., *Petitioners*

v.

LEDBETTER ERECTION COMPANY, INC.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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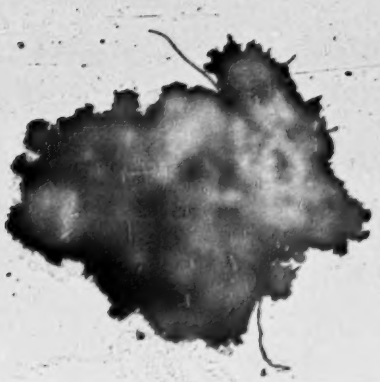

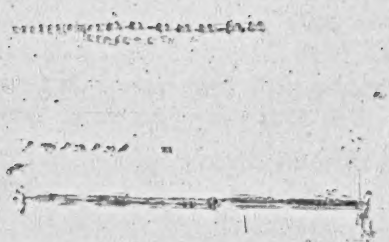

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF THE PETITION

THE BOARD'S INTEREST

Bypassing the National Labor Relations Board completely, respondent in this case sought and obtained injunctive relief in an Alabama Circuit Court against conduct which respondent alleged and the court found to violate Section 8(b)(4)(A)

and (B) of the National Labor Relations Act as amended. It is the Board's position that injunctive relief against such unfair labor practices may be obtained only through the procedure specified by Congress in the Act. Under that procedure, private parties may file charges with the Board alleging that unfair labor practices in violation of Section 8(b)(4) have been committed; if such charges are filed, the General Counsel must promptly conduct a preliminary investigation to determine whether the charges have merit and whether the Board would consider the impact of the unfair labor practice on interstate commerce sufficiently serious to warrant taking jurisdiction; if the charge is found adequate in both respects, the General Counsel must file a complaint with the Board, and apply to the appropriate federal district court for temporary injunctive relief pending disposition of the complaint by the Board; after hearing on the merits the Board is authorized to grant appropriate permanent relief, subject to review by the United States Courts of Appeals.

By failing to file a charge with the Board, and seeking injunctive relief from a state court instead, respondent aborted the entire statutory scheme. The Board believes that the integrity of the administrative process provided by Congress to remedy unfair labor practices cannot survive if private parties may, at their own option, simply avoid that process and obtain injunctive relief at

their own instance from other tribunals. Accordingly, the Solicitor General, on behalf of the Board, respectfully submits this memorandum as *amicus curiae* in support of the petition.

OPINIONS BELOW

The initial opinion of the Supreme Court of the State of Alabama (R. 38-54) is reported at 57 So. 2d 112, and its supplemental opinion on rehearing (R. 54-56) is reported at 57 So. 2d 121. The decisions of the Circuit Court for Montgomery County, Alabama, granting an injunction (R. 9) and refusing to dissolve it (R. 33) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1257, and the question whether the judgment below is "final" within the meaning of that Section is discussed, *infra*, pp. 19-21.

QUESTION PRESENTED

Whether, at the suit of an employer, a state court may issue a temporary injunction against violations of Section 8(b)(4)(A) and (B) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. Supp. IV, 141 *et seq.*, are set forth in the Appendix, *infra*, pp. 23-29.

STATEMENT

On October 20, 1950, Ledbetter Erection Company filed a complaint in an Alabama Circuit Court requesting an injunction against the Montgomery Building & Construction Trades Council and others, petitioners herein, for conduct alleged to violate Section 8(b)(4) of the National Labor Relations Act (R. 2-9). The allegations of the complaint may be summarized as follows:

Bear Brothers, a general contractor, entered into an agreement for the construction of a multi-story, 124 rental unit apartment house in Montgomery, Alabama (R. 3, 6). Bear Brothers subcontracted to Ledbetter the job of erecting and riveting the structural steel used in the construction of the apartment house (R. 3). Bear Brothers' employees were unorganized; Ledbetter's employees operated under a union-shop contract (R. 3, 4). The Trades Council placed a picket line around the construction project, which, the complaint alleged, induced Ledbetter's employees "to engage in a concerted refusal to perform services for the object of forcing or requiring another employer [Bear Brothers] to recognize or bargain with the labor organization" which had not been certified by the Board, "and to force or to require complainant Ledbetter Erection Company, Inc., to cease doing business with Bear Brothers, Inc." (R. 5). This conduct was alleged to be "a violation of Section 8(b)(4) of the National Labor Relations

Act as amended and amounts to secondary picketing as therein defined and prohibited" (R. 5).[1]

The complaint prayed for a temporary injunction, to be made permanent on final hearing, restraining the Trades Council from (1) picketing the construction job, (2) engaging in any unfair labor practice as defined by the Labor Management Relations Act, (3) inducing the employees of Ledbetter to engage in a concerted refusal to perform services for the purpose of forcing Bear Brothers to recognize an uncertified union as representative, (4) inducing the employees of Ledbetter to engaged in a concerted refusal to perform any services in order to force Ledbetter to cease doing business with Bear Brothers, and (5) for other relief (R. 8-9). The complaint also requested that on final hearing a judgment for damages be rendered "by reason of such unlawful picketing in violation of Section 303 of the Labor Management Relations Act" (R. 9).

On consideration of the complaint, a temporary injunction was granted in the identical terms requested (R. 9-11). The Trades Council moved to dissolve the injunction because the relief requested was within the exclusive authority of the National

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[1] While the picket line was alleged simply to violate Section 8(b)(4) of the Act; it is apparent that the wording of the complaint further limits the allegations to 8(b)(4)(A) and (B). No charge alleging that this conduct constituted an unfair labor practice was ever filed with the National Labor Relations Board.

Labor Relations Board to grant and the state court was therefore without jurisdiction (R. 19-21). Thereafter, in support of the complaint, an affidavit was filed by the vice president of Bear Brothers attesting (R. 22):

> that a labor dispute or stoppage of work on said project would materially obstruct or interfere with the free flow of goods in interstate commerce; that a large portion of the materials used in the construction of said job are shipped in interstate commerce and if such job were stopped by union activities, the flow of such goods in commerce would cease; for example, all of the exterior covering of said apartment house is brick, which will be shipped from Texas; the glazed tile from Pennsylvania; the steel sash from Detroit, Michigan; door frames from New York; metal lath from Ohio, plaster from Georgia, Virginia, and Texas; cement from various sources, including places outside of the State of Alabama; the structural steel was rolled at a rolling mill outside of the State of Alabama; paint and acoustical tile are not manufactured in the State of Alabama and are necessarily brought in from outside the State; electrical wiring and fixtures likewise, and in fact a great majority of the materials used on such job will necessarily move in interstate commerce.

Another affidavit, filed by the vice president of Ledbetter in support of the complaint, alleged that heavy equipment, valued at $25,000, which was being used on the project "has been scheduled for work on other jobs . . . out of the State of Alabama, which jobs are now being delayed because of the delay of work in Montgomery, caused by the picket line" (R. 30).

The motion to dissolve the injunction was denied by the Alabama Circuit Court (R. 33), and, on appeal to the Alabama Supreme Court from the denial of the motion, the judgment of the lower court was affirmed (R. 56-58). The ground for relief which the Alabama Supreme Court sustained, and which the complaint alleged, was a violation by Trades Council of Section 8(b)(4)(A) and (B) of the National Labor Relations Act. Distinguishing *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, and *UAW* v. *O'Brien*, 339 U. S. 454, because those cases pertained to enforcement of state legislation inconsistent with the National Act (R. 50-51, 52-53), the court below held that this case is different because the claim here asserted by the employer rests on "a right which the Labor Management Act has conferred upon him" (R. 51). Since the right it adjudicated in this case flows from the National Act, and not from state law, the court below stated that the only issue is "whether or not the Labor Management Act furnishes the exclusive remedy

for its enforcement" (R. 51). The court below concluded that "it was not the intention of Congress to make the administrative remedy exclusive in respect to all unfair practices affecting commerce" (R. 48), but that state courts have jurisdiction to vindicate, through the injunctive process at the suit of private parties, rights conferred by the National Act where irreparable injury is shown and the administrative remedy is inadequate.

The court below reasoned that "when the National Congress within its constitutional power passes an act conferring a right and providing a remedy, such remedy so provided is not ordinarily exclusive, thereby preventing such other remedies as may be available to obtain its benefits under state law then existing" (R. 44-45). Accordingly, "when commerce is affected, under the terms of the Labor Relations Act as amended, injunctive relief in the state court would not be set aside on account of such Act of Congress, unless it clearly excluded the jurisdiction of the state court in that respect" (R. 45). Such clear exclusion, the court below continued, was evinced by the Act before its amendment, for in empowering the Board to redress unfair labor practices, Section 10(a) of the National Act then read that this "power shall be exclusive"; but the word "exclusive" was deleted by the amendment to the Act, and this deletion "serves to eliminate that feature of the original act

which excluded all courts from exercising injunctive jurisdiction and limited all jurisdiction to the board exclusively" (R. 49, 45-49).

The court below distinguished *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4), and *International Longshoremen's & Warehousemen's Union* v. *Sunset Line & Twine Co.*, 77 F. Supp. 119 (N.D. Cal.), by reasoning that these cases are confined to excluding federal district courts from adjudicating rights conferred by the National Act, but do not extend to state courts (R. 46-49). As to the decisions of the California Supreme Court in *Gerry* v. *Superior Court*, 32 Cal. 2d 119, 194 P. 2d 689, and *In re De Silva*, 33 Cal. 2d 76, 199 P. 2d 6, which hold that a state court has no jurisdiction to redress an unfair labor practice, the court below stated that they are unpersuasive (R. 49-50). Finally, this Court's decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, since it "arose prior to the 1947 amendment," was found to have no "application to the present situation" (R. 49).

For the present the court below apparently limited its holding to permitting "a state court to enjoin an unfair labor practice by a labor organization under section 8(b)(4) and section 303, * * * which does not impede the flow of commerce, but which incidentally affects commerce" (R. 43, 48, 50, 51, 53). In addition, in confining its decision to the situation where the remedy before the Board

is inadequate, the court below held the remedy before the Board to be inadequate in the "special circumstances" of an uncontroverted allegation of irreparable injury, "augmented by the necessary time of the board in making the preliminary investigation, and subject to a possibility that the board will not take jurisdiction on account of the small amount of influence the transaction has on the flow of interstate commerce" (R. 55).

ARGUMENT

1. The holding of the court below, that the rights conferred by the National Act, as amended, are not subject to exclusive enforcement through the administrative scheme which the Act creates, is in square conflict with decisions of the courts of last resort of California,[2] New York,[3] and Minnesota,[4] and with decisions of lower courts in other states.[5]

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[2] *Gerry* v. *Superior Court*, 32 Cal. 2d 119, 194 P. 2d 689; *In re De Silva*, 33 Cal. 2d 76, 199 P. 2d 6.

[3] *Costaro* v. *Simons*, 302 N. Y. 318, 98 N. E. 2d 454; see also, *Ryan* v. *Simons*, 100 N. Y. Supp. 2d 18 (App. Div.); affirmed, 302 N. Y. 742, 98 N. E. 2d 707, certiorari denied, 342 U. S. 897; *Alonzo* v. *Industrial Container Corp.*, 193 Misc. 1008, 85 N. Y. Supp. 2d 835; compare, *Levinsohn* v. *Joint Board*, 299 N. Y. 454, 87 N. E. 2d 510.

[4] *Norris Grain Co.* v. *Nordaas*, 232 Minn. 91, 46 N. W. 2d 94. *Robinson Freight Lines* v. *Teamsters Union*, 28 LRRM 2453 (Court of Appeals, Tenn., July 18, 1951).

[5] *Reed Construction Co.* v. *Building Council*, 27 LRRM 2161 (Chan. Ct. Miss., February 22, 1950); *Wilkes Sportswear* v. *Garment Workers*, 29 LRRM 2300 (Common Pleas, Pa., December 26, 1951); compare *U. E.* v. *Lawlor*, 15 Conn. Sup. 326, 22 LRRM 2407 (Superior Ct., Conn., April 9, 1948).

It also squarely conflicts with decisions of the United States Courts of Appeals for the Fourth,[6] Eighth,[7] and Ninth[8] circuits, and with numerous decisions of the federal district courts.[9] The court below attempts to distinguish the conflicting federal authority on the ground that these holdings are explained by the curtailed jurisdiction of federal district courts to act in labor disputes by virtue of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 101, *et seq.*), a reason which does not apply to the exercise of general equity power by a state court (R. 46-49). But it is clear that the decisions of the federal courts are based on the view that the Board's jurisdiction to remedy unfair labor practices is exclusive, and for that reason application to other tribunals is foreclosed. Furthermore, were it true that the National Labor Relations Act contemplated a judicial as well as an administrative remedy at the option of an ag-

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[6] *Amazon Cotton Mills Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C. A. 4); see also, *Textile Workers Union* v. *Arista Mills Co.*, 193 F. 2d 529 (C. A. 4).

[7] *Amalgamated Association* v. *Dixie Motor Coach Corp.*, 170 F. 2d 902 (C. A. 8).

[8] *Schatte* v. *Theatrical Stage Employees*, 182 F. 2d 158 (C. A. 9), certiorari denied, 340 U. S. 827; *California Association* v. *Building Tades Council*, 178 F. 2d 175 (C. A. 9).

[9] *I.L.U.* v. *Sunset Line & Twine Co.*, 77 F. Supp. 119 (N. D. Cal.); *United Packing House Workers* v. *Wilson & Co.*, 80 F. Supp. 563 (N. D. Ill.); *Textile Workers Union* v. *Berryton Mills*, 28 LRRM 2540 (N. D. Ga., July 23, 1951); *Born* v. *Cease*, 101 F. Supp. 473 (D. Alaska); compare *Reavis* v. *I. B. E. W.*, 101 F. Supp. 542 (N. D. Tex.).

grieved person, the earlier enacted Norris-La Guardia Act would not stand as a barrier to recourse to the federal district courts. *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 563; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 237-240. Accordingly, the decisions of the federal courts cannot be explained on the reasoning of the court below.

2. Before amendment of the National Labor Relations Act, it was settled that vindication of the rights it conferred was "confided by the Act, by reason of the recognized public interest, to the public agency the Act creates." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 266.[10] The amendments to the Act made no change in the underlying statutory scheme. Congress was aware that the new unfair labor practices defined by the amended Act, including Section 8(b)(4), would, like the old, be enforceable only through the Board. Because of recognition that "appeal must be made * * * to the National Labor Relations Board" and that obtaining relief "depends upon the decision of the National Labor Relations Board as to whether any action shall be taken, and the conduct of the proceedings will be entirely in the

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[10] See also, *U.E.R. & M.W.* v. *I.B.E.W.*, 115 F. 2d 488 (C.A. 2); *Fur Workers Union, Local No. 72* v. *Fur Workers Union, Local No. 21238*, 105 F. 2d 1, 8-17 (C.A.D.C.), affirmed, 308 U.S. 522; *Int'l Brotherhood* v. *Int'l Union*, 106 F. 2d 871 (C.A. 9); *Blankenship* v. *Kurfman*, 96 F. 2d 450 (C.A. 7).

hands of the NLRB attorneys instead of attorneys of the injured party," a minority of the Senate Labor Committee, among whom Senator Taft was one, proposed that, with respect to 8(b)(4) violations, private parties be allowed direct recourse to federal district courts for injunctions under a procedure substantially freed from the restrictions of the Norris-La Guardia Act. S. Rep. No. 105, 80th Cong., 1st Sess., 54-56. After much discussion, this proposal was voted down. 93 Cong. Rec. 4847. It was rejected because enforcement was deemed more suitably entrusted to administrative processes exclusively controlled by a specialized agency in which precipitate action would be guarded against by preliminary investigation; it was also feared that private recourse to injunctive relief uncontrolled by the safeguards of the Norris-La Guardia Act would reintroduce familiar abuses. 93 Cong. Rec. 4834-4847, 4864, 4868, 6446, 4132-4133, S. Rep. No. 105 80th Cong., 1st Sess., 56. Accordingly, Congress retained the "administrative law approach" and rejected the "so-called court approach." 93 Cong. Rec. 4132. See *Bakery Drivers Union* v. *Wagshal*, 383 U. S. 437, 442. However, to be certain that the final relief awarded by the Board would not be rendered ineffective by the interim continuance of conduct forbidden by Section 8(b)(4)(A), (B), and (C), Congress enacted Section 10(l) of the Act *requiring* the appropriate officer of the Board to petition a federal

district court for a temporary injunction "pending the final adjudication of the Board with respect to such matter." Like the permanent relief to which it is auxiliary, the Board in this connection acts "in the public interest and not in vindication of purely private rights * * *." S. Rep. No. 105, 80th Cong., 1st Sess., p. 8.

Impressed "that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes seemed to be so strong," Senator Taft offered as a compromise alternative to create a cause of action for money damages only for the same conduct proscribed by Section 8(b)(4) as unfair labor practices. 93 Cong. Rec. 4843-4844. Section 303 of Title III, Labor Management Relations Act, embodying this compromise, was thereafter introduced and enacted (93 Cong. Rec. 4858-4860, 4874; see also, *ILWU v. Juneau Spruce Corp.*, 342 U. S. 237, 243-245). It permits suit for money damages, to compensate for injury from conduct identical to that prohibited by 8(b)(4), to be brought "in any district court of the United States * * *, or in any other court having jurisdiction of the parties * * *." The court below treats the situation as if the jurisdiction conferred to entertain suits for money damages only extended to injunctive relief against 8(b)(4) conduct as well, whereas the fact is that injunctive jurisdiction was rejected and, as an alternative to it, suit for damages, to be brought in any court, was alone authorized.

3. To permit any court of general jurisdiction to enforce rights conferred by the Act on application of a private person would destroy the integrated administration of the Act through centralized control in the Board. There would be an end to "uniformity of administrative policy and disposition, expertness of judgment, and finality in determination" (*Aircraft Corp.* v. *Hirsch*, 331 U. S. 752, 767-768), which it is the objective of the administrative process to achieve and which a settled course of interpretation safeguards against disruption. *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Far East Conference* v. *United States*, 342 U. S. 570. The anomaly of the conclusion reached by the court below is particularly apparent here. As the court below appears to acknowledge (R. 50-51, 52-53), were Alabama to duplicate the unfair labor practices defined by the National Act and apply the prohibitions to operations affecting commerce, it is clear that Alabama would have intruded into the field which Congress by the National Act has occupied to the exclusion of the states. *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953; *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 390, n. 12. Alabama cannot achieve the same result, and the same mischief in administration, by enforcing the National Act rather than its own law.

4. In the light of these considerations, the elimination of the word "exclusive" by the amendment to Section 10(a) of the National Act, in defining the power of the Board, does not, as the court below believes, have the extravagant purpose of overturning the statutory scheme theretofore existing and permitting concurrent enforcement of unfair labor practices by state courts in addition to the Board. As the House Conferees explained, because of the amendment's new "provisions authorizing temporary injunctions enjoining alleged unfair labor practices" at the suit of the Board in a federal district court pending proceedings before the Board (Section 10(j) and (l)), and because of "provisions making unions suable for money damages for conduct parallel to the Section 8(b)(4) unfair labor practices (*supra*, p. 14), it was thought no longer appropriate to describe the Board's power as wholly exclusive. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 52. It was for this purpose alone that the word "exclusive" was deleted. This deletion had no purpose of radically innovating a wholly new scheme of enforcement. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 187 (C.A. 4); *Born* v. *Cease*, 101 F. Supp. 473, 477 (D. Alaska). Furthermore, in ascertaining whether particular enforcement machinery which Congress creates precludes resort to any other, the determination has never turned on whether the word "exclusive" was in

terms used. *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 264; *Bethlehem Steel Co.* v. *New York State Board*, 330 U. S. 767, 772; *Fur Workers Union, Local No. 72* v. *Fur Workers Union, Local No. 21238*, 105 F. 2d 1, 12 (C.A. D.C.), affirmed, 308 U. S. 522; *National Labor Relations Board* v. *Northern Trust Co.*, 148 F. 2d 24, 27 (C.A. 7).

5. The attempt of the court below to limit its holding to permitting a state court to act where the unfair labor practice affects commerce but does not impede its flow is unpersuasive. "Congress drew no such distinction but, instead, saw fit to regulate labor relations to the full extent of its constitutional power under the Commerce Clause." *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 391. The requisite commerce existing, nothing in the Act can be read to say that unfair labor practices impeding its flow are solely for the Board but a lesser impact on it permits concurrent enforcement by state courts and the Board.

6. The court below further limits its holding to situations where the remedy before the Board is inadequate. This limitation is also unpersuasive. The grounds of inadequacy stated by the Court are (1) the time consumed in the Board's preliminary investigation before it will seek a temporary injunction, during which irreparable injury may

occur, and (2) the possibility that the Board may choose not to take jurisdiction, for administrative reasons of budget and staff availability, where the impact on commerce, though enough for the Board to exercise jurisdiction, may not be sufficiently substantial to warrant its exertion.[11] The first factor is present in every case so that the remedy before the Board would in the view of the court below never be adequate. Furthermore, it was precisely because the Board does conduct a preliminary investigation to screen out unmeritorious cases that enforcement of Section 8(b)(4) was entrusted to it rather than to private initiative (*supra*, p. 13). Finally, that the Board may not entertain an unfair labor practice charge, because of its insubstantial impact on commerce measured by the Board's administrative standards, does not change the right conferred, or the method of its enforcement, from a public to a private one.[12]

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[11] See *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675, 684. There is no evidence in the record of this case sufficient to determine whether or not, in the exercise of its administrative discretion, the Board would act here. But compare the commerce factors involved in the construction of the multi-story 124 unit apartment house in this case (R. 22, 30) with those involved in the construction of a commercial building in *National Labor Relations Board* v. *Denver Building & Trades Council*, 341 U.S. 675, 683-684, and the construction of a private dwelling in *Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 696, 699.

[12] In any event, the Board must certainly be given an opportunity to decide, before other tribunals intervene,

7. 28 U. S. C. 1257 confers on this Court the power to review "Final judgments or decrees rendered by the highest court of a State * * *." While the decree sought to be reviewed in this case (R. 56) is one which, in terms, merely affirms a lower court decree (R. 33) denying a motion to dissolve a temporary injunction, it has been settled since *Clark* v. *Williard*, 292 U. S. 112, 118, that the face and form of the judgment is not controlling. See, *e.g.*, *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 546.

Section 10(l) of the National Labor Relations Act, as amended, Appendix, *infra*, pp. 26-27, confers on the appropriate officer of the Board the power to petition a federal district court "for appropriate injunctive relief pending the final adjudication of the Board * * *." The whole question in this case is whether anyone other than the Board may seek temporary relief.

This question is reviewable now or it is not re-

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whether its own standards call for the exercise of its jurisdiction. Since the Board can make this determination only after a charge has been filed with it, the filing of a charge with the Board would, on any theory, be an indispensable precondition to resort to any other tribunal. There is no occasion in this case to determine whether, if the Board declines to take jurisdiction, a State is free to act. If there is room for State action, it could in any event only invoke its own law, and not, as the court below did, rely on the National Act which confers no enforcement authority on it in any circumstances. Compare Section 10(a) of the Act; see also *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301, 313.

viewable at all. To await the outcome of the final hearing, whether it results in the grant or denial of a permanent injunction, is necessarily to moot the question as to whether a state court has jurisdiction to grant a temporary injunction, for the temporary injunction can in no event survive the ultimate judgment. The history of the temporary injunction in labor disputes teaches that it often conclusively settles the controversy adversely to the enjoined party or at the least irretrievably alters its status. The power to grant interim relief in a labor dispute is therefore too important a question to permit to go unreviewed through the route of mootness. Compare *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546. In situations "where intermediate rulings may carry serious public consequences" (*Radio Station WOW* v. *Johnson*, 326 U. S. 120, 124), and "postponed review" is "so illusory as to make the decree 'final' now or never" (*Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 70), the prerequisite of finality has been met.

The question is ripe for adjudication. The decision of the court below is its definitive disposition of the issue, and the record made is adequate for its review. In addition, because the same considerations underlie both, and the court below decided both, determination whether a state court may grant temporary injunctive relief to restrain violations of the National Act will also decide

whether permanent relief is likewise available. Moreover, as the court below noted (R. 54, 41), and as the petition for certiorari concedes (p. 3), petitioners do not contest that they have violated Section 8(b)(4)(A) and (B) of the National Act. Accordingly, there is small likelihood that further proceedings in the state court will generate additional federal questions. "The policy against fragmentary review has therefore little bearing." *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 72.

Accordingly, this is not the conventional situation where the grant or denial of interlocutory relief does not give rise to a final judgment. In this case it is the very action of the state court in undertaking to grant temporary injunctive relief, and not merely a decision made in the course of an otherwise unobjectionable interim proceeding, which creates the federal question. It is in principle indistinguishable from the finality which attaches to the grant or denial of a writ of prohibition challenging the jurisdiction of a lower state court in an appellate state court on a federal ground. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 565-568. It is the conclusive adjudication of a matter distinct and severable from the general subject of the litigation and therefore it is a reviewable final judgment. Compare *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68; *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 126; *Clark* v. *Williard*, 292 U. S. 112, 117-119; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546-547.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted. If the writ is granted and oral argument scheduled, the Board respectfully prays leave to participate therein.

Respectfully submitted,

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MAY, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, 141 *et seq.*), are as follows:

Sec. 2. When used in this Act—

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their em-

ployment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 * * *.

* * * *

Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that re-

spect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have oc-

curred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction

to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * *

* * * *

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act; ;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the

United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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